

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

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FILE: B-217088

DATE: September 3, 1985

MATTER OF: Caprock Vermeer Equipment, Inc.

DIGEST:

1. Protest that contracting officer gave misleading advice as to protest procedures is denied where protester was correctly instructed to file its protest first with contracting agency and then, if necessary, with GAO.
2. Contracting agency properly considered unsolicited descriptive literature furnished with protester's bid where the literature described the same name and model number as equipment offered in the bid.
3. Protester's bid was properly rejected as nonresponsive where unsolicited descriptive literature furnished with bid contained handwritten annotations indicating salient feature of brand name equipment to be procured was not included in bid.
4. A bidder's intention must be determined from bid itself at the time of bid opening, and contracting agency could not have considered any postopening explanations by protester in determining responsiveness of its bid.
5. Statement, contained in successful bidder's unsolicited descriptive literature, which was merely descriptive of its standard equipment and not a limitation of the features otherwise described on that bidder's specification sheet, which included salient features, did not render bid ambiguous so as to require its rejection.

Caprock Vermeer Equipment, Inc. (Caprock), protests the award of a contract to Valley Equipment Company, Inc. (Valley), d/b/a Ditch Witch of El Paso, under invitation for

bids (IFB) No. DAA007-84-B-0069, issued by the Department of the Army. Caprock challenges the Army's rejection of its "basic" bid as nonresponsive and, also, questions the responsiveness of the awardee's bid. We deny the protest.

The IFB solicited bids for an earthmoving trencher, on a brand name or equal basis, described as a "Ditch Witch Machine 5010-Diesel with Backhoe, or Vermeer Model M455 with roll over protection option, or equal in accordance with Salient Characteristics in Section C." The Army received three bids prior to bid opening, two of which were submitted by Caprock, and the third by Valley. The Army subsequently determined that both Caprock's low "alternate" bid and its second low "basic" bid were nonresponsive and made the award to Valley. Caprock originally protested the rejection of its "basic" bid to the Army. After its agency protest was denied, Caprock filed the instant protest alleging that its bid was improperly rejected as nonresponsive and that it was deliberately misled by the Army contracting officer as to the protest procedures to be followed while the Army made the award.

Regarding Caprock's contention that it was misled by the Army, we note that the record shows that the award to Valley had already been made before Caprock inquired as to the protest procedures. Furthermore, it appears that the contracting officer gave Caprock correct advice consistent with our Bid Protest Procedures then in effect as to the applicable protest procedures, i.e., filing with the agency and then, if necessary, with this Office. See 4 C.F.R. § 21.2(a) (1984). By following the advice, Caprock was able to timely file its protest here. We therefore find no merit in Caprock's allegation that it was misled by the Army as to protest procedures.

We next consider Caprock's contention that the Army improperly rejected its "basic" bid as nonresponsive. (Caprock does not protest the rejection of its "alternate" bid.)

The IFB listed "4-way ROPS [rollover protective structures]" as a salient characteristic. Caprock's "basic" bid offered the specified Vermeer model M455. However, Caprock also furnished descriptive literature with its bid consisting of a brochure which described the model M455 and various options. The brochure contained handwritten annotations which the Army maintains rendered Caprock's bid ambiguous as to the inclusion of the ROPS salient feature. Specifically, the literature listed "4-Post ROPS" as "optional," and the feature was not included in Caprock's

handwritten bracket as were other required salient features. The Army concluded that Caprock's bid was nonresponsive for failing to indicate clearly that Caprock would be obligated to furnish the 4-Post ROPS feature under its bid.

Caprock argues that while its literature described the 4-Post ROPS as an option, it included the specification sheet containing the salient characteristics with its bid which did not describe the feature as optional, and there was no statement that inclusion of the 4-Post ROPS would result in additional cost. Caprock also questions why the Army made no attempt to clarify any questions raised by the literature by conducting discussions with Caprock. Additionally, Caprock asserts that Valley's bid was similarly qualified by its literature and that the Army acted arbitrarily by rejecting Caprock's bid while accepting Valley's bid.

As explained below, we find the Army acted reasonably in determining Caprock's bid ambiguous and, therefore, nonresponsive. The IFB contained the standard "Brand Name or Equal" clause found in the Department of Defense Supplement to the Federal Acquisition Regulation (FAR). 48 C.F.R. § 252.210-7000 (1984). The clause does not require a bidder to furnish descriptive material unless an "equal" product is being offered. Therefore, where, as here, the brand name products specified are being offered, no descriptive literature is required. The FAR provides for the consideration of unsolicited descriptive under the procedures set forth in section 14.202-4(g) for unsolicited bid samples, (48 C.F.R. § 14.202-5(f) (1984)), as follows:

"Unsolicited Samples. Bid samples furnished with a bid that are not required by the invitation generally will not be considered as qualifying the bid and will be disregarded. However, the bid sample will not be disregarded if it is clear from the bid or accompanying papers that the bidder's intention was to qualify the bid. (See 14.404-2(d) if the qualification does not conform to the solicitation.)" (Emphasis added.)

Section 14.404-2(d), as referred to above, provides in part:

"A bid shall be rejected when the bidder imposes conditions that would modify requirements of the invitation or limit the bidder's

liability to the Government, since to allow the bidder to impose such conditions would be prejudicial to other bidders."

Where the unsolicited literature describes the same name or model number as the equipment offered in the bid, we have found a sufficient relationship between the bid and literature so that the literature may not be disregarded. See Devault Manufacturing Co., B-195959, Jan. 7, 1980, 80-1 CPD ¶ 18 at 3. Since the literature furnished by both Caprock and Valley contained the same name and model number as the equipment offered in their bids, the contracting officer was required to consider the literature as qualifying the bids.

Examination of the literature furnished by Caprock reveals that the 4-Post ROPS feature was identified as "optional" and, more importantly, not contained in Caprock's handwritten bracket which we believe the Army reasonably interpreted as indicating which features were to be included in Caprock's bid. The literature thus indicates the 4-Post ROPS feature was not being offered. While nothing in the bid itself suggested that 4-Post ROPS would not be furnished, the descriptive literature qualified Caprock's bid so as to make it ambiguous because it was subject to two interpretations, one of which would be nonresponsive. Under these circumstances, Caprock's bid was properly rejected as nonresponsive. See Franklin Instrument Co., Inc., B-204311, Feb. 8, 1982, 82-1 CPD ¶ 105 at 3.

Moreover, it would have been improper for the Army to request clarification from Caprock of its descriptive literature, as Caprock suggests, since this would afford the bidder an opportunity to alter the responsiveness of its bid by extraneous material not available at bid opening. See 49 Comp. Gen. 851, 852 (1970), citing B-166284, Apr. 14, 1969. A bidder's intention must be determined from the bid itself at the time of bid opening, and only material then available may be considered. Franklin Instrument Co., Inc., *supra*, at 2-3. Thus, the Army could not have considered any postopening explanations by Caprock in determining the responsiveness of the bid.

Finally, Caprock points out that Valley also furnished a brochure which Caprock alleges casts doubt on the responsiveness of Valley's bid regarding the 4-Post ROPS feature. Valley included a brochure describing its Ditch Witch model 5010 and containing the statement "Two-Post ROPS is standard." Unlike Caprock's literature, however, there were no additional handwritten annotations indicating that the

4-Post ROPS feature would not be made available under Valley's bid. We therefore find the Army reasonably understood the statement as merely descriptive of Valley's standard equipment and not necessarily a limitation of the features otherwise described on Valley's bid specification sheet, which included 4-Post ROPS. Accordingly, we reject Caprock's allegation that the Army acted arbitrarily in accepting Valley's bid.

The protest is denied.

for Symon E. Van
Harry R. Van Cleve
General Counsel